Supreme Court of the United States.

OCTOBER TERM, 1900.

PETITION OF HENRY L. WARD, TREASURER, FOR WRIT OF CERTIORARI.

To the Honorable the Justices of the Supreme Court of the United States:

The petition of Henry L. Ward, Treasurer, of Burlington, in the State of Vermont, for a writ of certiorari to the judges of the United States Circuit Court of Appeals for the First Circuit to bring before the Supreme Court of the United States a certain action of debt pending in and lately decided by said Circuit Court of Appeals, wherein said Henry L. Ward, treasurer, is plaintiff in error, and Edward Joslin, of Keene, in the State of New Hampshire is defendant in error, respectfully shows as follows:

First. The case referred to is numbered 340 on the docket of said Circuit Court of Appeals, and is entitled,

HENRY L. WARD, Treasurer, Plaintiff,
Plaintiff in Error,

v.

EDWARD JOSLIN, Defendant,
Defendant in Error.

The printed record of said case herewith submitted is cited and referred to in this petition.

Second. Said suit was begun by attachment on a writ and declaration in an action of debt on December 15, 1896, and was entered in the Circuit Court of the United States for the District of New Hampshire, on May 8, 1897. The petitioner is a judgment

creditor of The Western Investment Loan and Trust Company (hereinafter referred to as the Trust Company), a corporation organized under the laws of the State of Kansas for the purposes set forth in its charter (Record, p. 38), as follows: "To buy and sell personal property, including stocks, bonds, bills, notes, real and chattel mortgages, and choses in action of every kind and description, and to transact the business of a loan and trust company."

Third. The petitioner recovered judgment against said Trust Company by default after due service on the president of the corporation (Record, p. 93), upon the guaranty of three notes for twenty-five hundred dollars each. These notes were made by S. S. Hite and his wife, dated September 12, 1888, and payable on September 12, 1892, to one J. E. Ethell, at the office of the Trust Company in Topeka, Kansas (Record, p. 86). They were endorsed to the petitioner by Ethell "without recourse" and at the same time (p. 80) were guaranteed by the Trust Company as follows (p. 87):

"TOPEKA, KANSAS, May 9, A.D. 1889.

"For a valuable consideration, The Western Investment Loan and Trust Company hereby guarantees payment of the within obligation, both principal and interest, at maturity.

"THE WESTERN INVESTMENT LOAN AND TRUST COMPANY,
"By L. L. TURNER,
"*President.*

"Attest:
"SAMUEL T. HOWE,
Secretary.

"Negotiated by The Western Investment Loan and Trust Company, Topeka, Kansas."

Fourth. These three notes were secured by a trust deed from S. S. Hite and wife to one C. F. Jilson, as trustee, and the Trust Company as a third party (Record, pp. 88–91). The Trust Company had the exclusive right under this deed to declare the notes

due upon any default, to demand the foreclosure of the mortgage by Jilson, and to receive the proceeds of the mortgage to protect it on its guaranties.

Fifth. The directors of the Trust Company had a meeting on August 7, 1888, and voted that the president and secretary be authorized to guarantee the payment of all securities negotiated by the company in one of three forms (p. 55), the second of which was identical with the guaranty on the above notes, excepting that Form 2 authorized the guaranty of payment "within days after maturity" instead of "at maturity" as appeared in the notes.

Sixth. The petitioner recovered judgment against the Trust Company on the guaranties of the above three notes on March 7, 1893 (Record, p. 96), in the District Court, of Smith county, in Kansas, and thereafter execution was duly issued against the Trust Company and returned wholly unsatisfied (Record, p. 100).

He now seeks to hold the respondent liable as a stockholder in the Trust Company under paragraph 1192 of the General Statutes of Kansas for 1889, which is as follows:

"1192. If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder, except upon an order of the court in which the action, suit, or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and, upon such motion, such court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

Seventh. The respondent admitted in his deposition that he purchased one hundred shares of the Trust Company in 1888 of a par value of fifty dollars a share (p. 64, Int. 3, 4); that on June 9, 1894, he transferred these shares to Frederick E. Kingsbury (p. 64, Int. 5, 6), who was his grandson (pp. 73, 74, Int. 2); that

this transfer was without any consideration (p. 69, Cross-Int. 39); that his grandson at that time had no visible attachable property (p. 69, Cross-Int. 44, 45), and had none at the time of this action (p. 69, Cross-Int. 45, 46; p. 76, Cross-Int. 32); that he knew business was oppressed in 1893 and 1894, and Kansas companies stopped paying dividends and as a general thing had to succumb (p. 72, Cross-Int. 75, 76, 79, 80); that he would suspect something was wrong if any company passed its dividends (p. 67, Cross-Int. 15, 16, 17, 18); that he received no dividends from the Trust Company after July 1, 1890 (p. 66, Cross-Int. 4; p. 67, Cross-Int. 8, 9, 10, 11); that he had already been sued on his Kansas stockholder's liability in another company before he transferred these shares (p. 65, Int. 20, 21, 22); and that he transferred these shares "to avoid expense of defending suits and trouble," and considered there was value in the stock, and he had rather the value of the stock should go to his family than to expend it in defending suits (p. 65, Int. 20, 21, 22; p. 68, Cross-Int. 28, 29, 33, 34, 35).

James A. Troutman, the president of the Trust Company, testified that the company was insolvent on January 1, 1891, and since that time (Record, p. 43, Int. 34, 35); and that it issued no financial statement later than August 26, 1891 (p. 44, Int. 40, 41, 42). This evidence was not contradicted.

Eighth. Upon the foregoing testimony and admissions of the respondent and his grandson, the Circuit Court found as a fact "that the transfer was not such a *bona fide* transfer as to relieve the defendant from his individual liability as a stockholder if he were otherwise liable" (Record, p. 7). The respondent conceded this also at the argument in the Court of Appeals.

Ninth. The record evidence in the case consisted of the charter (p. 38), by-laws (pp. 50–53), and minutes (pp. 53–60), of the Trust Company, and the petitioner's judgment and execution against that company (pp. 79–101). The other evidence consisted of the depositions of the respondent and his grandson, and the deposition of James A. Troutman, the president of the Trust Company, identifying the by-laws and minutes. This was all the evidence in the case. There was no evidence in the depositions in any way tending to show that the guaranties, upon which

the petitioner's judgment against the Trust Company was based, were *ultra vires.*

Tenth. A jury trial was expressly waived in the Circuit Court (Record, p. 6). At the argument upon the evidence and the law in the Circuit Court, and before the findings of that court, the petitioner presented five separate requests for rulings of law by the court, as follows (Record, p. 11):

1. Upon all the evidence in the case the plaintiff is entitled to recover as a matter of law, and a finding should be made for the plaintiff for the full sum claimed in his declaration.

2. The execution in evidence in this case is an execution against the effects of a corporation within the meaning of paragraph 1192 of the General Statutes of Kansas, 1889.

3. The judgment and execution against The Western Investment Loan and Trust Company, in evidence, are included in the word "dues" in Article 12, Section 2, of the Constitution of Kansas, and constitute such a "due" as is secured by the individual liability of stockholders in corporations organized under the laws of Kansas.

4. The guaranties of said corporation, which are declared on in the plaintiff's second, fourth, and sixth causes of action in his suit against said corporation, as appears from the record in evidence, were not *ultra vires*, or beyond the power of said corporation to make.

5. If the Court finds that said guaranties of said corporation were *ultra vires* and beyond the power of said corporation to make, that is no defence in this action.

The Circuit Court considered these propositions and declined to adopt them in the decision of this case, whereupon the petitioner duly excepted to this refusal of the Court, and these exceptions were allowed (Record, pp. 10–15).

Eleventh. The Circuit Court found as facts (Record, p. 7) that the respondent was a stockholder; that the petitioner had a valid judgment against the Trust Company with execution thereon returned wholly unsatisfied; and that the petitioner's "claim against the Trust Company was upon a guaranty, given upon a valuable consideration, of the payment of certain promissory notes from one third party to another, and was not a guaranty of the payment of securities negotiated by the company."

The Circuit Court further found (p. 8) that this guaranty was not within the scope of the business of the Trust Company, and "was not intended by the defendant stockholder, and was not contemplated by the Kansas Constitution as a due or debt within such scope," and made a general finding for the respondent.

Twelfth. The Circuit Court also made a declaration of law (Record, p. 20).

Thirteenth. The petitioner thereupon filed a motion for a new trial in order that he might show "that the guaranties, upon which the plaintiff's judgment against said corporation was founded, were guaranties of obligations really owned by said corporation and negotiated by it" (Record, p. 9), and that the notes were made payable to Ethell "only nominally and for the convenience of said corporation, and as trustee for said corporation." The Circuit Court denied this motion for a new trial (Record, p. 10).

Fourteenth. Judgment for the respondent was entered in the Circuit Court on May 7, 1900, and on May 8, 1900, the petitioner filed his petition for a writ of error in the Circuit Court and with the same an assignment of errors, upon which petition a writ of error issued on May 16, 1900, and was duly entered in the United States Circuit Court of Appeals for the First Circuit, all of which appears by the printed record in said case (Record, pp. 1, 2, 14–19, 24).

Fifteenth. A hearing was had upon said case in said Circuit Court of Appeals on October 3, 1900, before Judges Colt, Putnam, and Brown, and on December 6, 1900, judgment was rendered against your petitioner, for the reasons set forth in the opinion of the Court which is shown in the printed record (pp. 107–117).

Sixteenth. On December 24, 1900, the petitioner filed a petition for a rehearing upon eleven grounds (Record, pp. 121–128), which are comprised in the following points:

1. Because the Court of Appeals in its decision assumed that there was evidence in the record to support the finding of the Circuit Court that the guaranties of the Trust Company, upon which the plaintiff's judgment was based, were *ultra vires*, whereas there is no evidence whatever in the case tending to show that they were *ultra vires*.

2. Because the Court of Appeals failed to inspect the evidence

for the purpose of ascertaining whether or not there was any evidence of *ultra vires* as required by the plaintiff's first and fourth assignments of error.

3. Because the record of the plaintiff's judgment against the Trust Company does not show that these guaranties were necessarily *ultra vires*, and every presumption should be made in support of that judgment.

4. Because the record of the plaintiff's judgment against the Trust Company shows affirmatively that the notes were negotiated for the benefit of the Trust Company and not of Ethell, and the guaranty of notes negotiated by a trustee for the benefit of the Trust Company would not be *ultra vires*.

5. Because the plaintiff in error is a holder for value and before maturity and is presumed to be a *bona fide* holder.

6. Because the decision of the Court of Appeals is contrary to the repeated decisions of this court, and in particular to the decision of this court in the case of Hancock National Bank *v.* Farnum, 176 U.S. 640, and is not supported by any authorities.

7. Because the decision of the Court of Appeals permits the defendant in error, under the guise of examining the plaintiff's claim against the corporation, to allege that the plaintiff has no valid claim against the corporation, and without proof to impeach the plaintiff's judgment against the corporation.

8. Because under the laws of Kansas the Trust Company had the power to guarantee the payment of obligations secured by real estate, and the legislature of Kansas has recognized and ratified this right by the passage of Chapter 109, Section 1, of the laws of Kansas for 1889.

Chapter 23, Article 3, Section 15, of the complied laws of Kansas of 1885, is as follows: "Section 15. Corporations shall have power to borrow money on the credit of the corporation, not exceeding its authorized capital stock, and may execute bonds or promissory notes therefor, and may pledge the property and income of the corporation."

This was amended by Chapter 109, Section 1, of the laws of Kansas for 1889, by adding thereto the following: "Provided, however, that the provisions of this section shall not apply to the debentures or bonds of any loan or trust company, duly incorporated under the provisions of this chapter, the payment of which

debentures or bonds shall be secured by a transfer of real estate or by other securities for the benefit and protection of purchasers of said debentures or bonds: such collaterals to be at least equal in amount to the par value of such bonds or debentures, and all real estate mortgage securities to be first liens on the property on which loans are made."

On January 16, 1901, said petition for rehearing was denied by the Circuit Court of Appeals.

On January 17, 1901, your petitioner filed a petition asking for a stay of mandate pending certiorari proceedings, and the mandate was stayed until the further order of the Court.

Seventeenth. Your petitioner bases his request for the issuance of the writ of certiorari upon the following grounds:

I.

Because this is a case of peculiar gravity and of general importance for the reason that the United States Circuit Court of Appeals for the First Circuit has absolutely declined to adopt and follow rulings of law established by this court in each instance by repeated decisions, upon the following points:

1. Exceptions to the rulings of the court, where jury trial is waived, upon propositions of law duly presented to the court and considered before the finding, are properly presented to the Circuit Court of Appeals in a bill of exceptions duly allowed by the Circuit Court.

2. The refusal of the Circuit Court to rule that upon all the evidence in the case the plaintiff is entitled to recover as a matter of law, when application for such ruling is made before the finding of the court, raises a question of law, which, if exception is taken and preserved in a bill of exceptions, presents a question of law for the decision of the Circuit Court of Appeals.

3. A "judgment is not only conclusive as to what was actually determined respecting such demand, but as to every matter which might have been brought forward and determined respecting it."

4. A stockholder "is so far an integral part of the corporation that, in the view of the law, he is privy to the proceedings touching the body of which he is a member," and a judgment against

the corporation is binding on its stockholders in the absence of fraud and collusion.

5. "The power which can give authority to act can ratify any act that is taken, and generally legislative recognition of an act or a corporation validates the act or the corporation, although neither one nor the other may have had full prior legal authority."

6. "When a contract is not on its face necessarily beyond the scope of the power of the corporation by which it was made, it will, in the absence of proof to the contrary, be presumed to be valid."

7. A holder of negotiable paper for value and before maturity is presumed to be a *bona fide* holder.

8. "Acts done by the corporation, which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter."

Either of the first two points establishes the right of the petitioner to be heard in the Circuit Court of Appeals upon the other propositions. If any one of the remaining six propositions of law had been adopted and applied to this case by the Circuit Court of Appeals the petitioner would have been entitled to a new trial or to a judgment on the facts found.

The decisions of this court establishing these propositions of law, with their application to this case, are presented in the brief of your petitioner submitted herewith.

II.

Because the Court of Appeals rested its decision against your petitioner upon the sole ground that the guaranties of the Trust Company, upon which his judgment against that company was recovered, were *ultra vires;* whereas there is no evidence in the case tending to show that those guaranties were *ultra vires.* Your petitioner raised this question by requests for rulings which are embodied in the bill of exceptions (Record, p. 11), and in the first and fourth assignments of error (Record, pp. 16–17), as exceptions to the refusal of the Circuit Court to rule as follows:

1. Upon all the evidence in the case the plaintiff is entitled to recover as a matter of law, and a finding should be made for the plaintiff for the full sum claimed in his declaration.

4. The guaranties of said corporation, which are declared on in the plaintiff's second, fourth, and sixth causes of action, in his suit against said corporation, as appears from the record in evidence, were not *ultra vires* or beyond the power of said corporation to make.

The Court of Appeals did not inspect the record for the purpose of ascertaining whether or not there was any evidence to show that the guaranties were *ultra vires*, but in the opinion says (Record, p. 114): "We have, on the face of the declaration, claims for purely independent guaranties, made by a corporation on securities not negotiated by it, supplemented by such findings by the Circuit Court as precludes the possibility that there were any facts, as, for example, by-laws not pleaded, or any other facts not disclosed by the declaration, which could relieve the nature of the transaction." Again the Court says: "They have no relation to a conclusive presumption, nor any pertinency when the true facts of the case are reached, as they are at bar."

It is obvious that such a decision is a great injustice, if there is no legal evidence in the case tending to show *ultra vires*. It was the duty of the court to inspect the evidence and pass upon the errors assigned by the petitioner. Such exceptions raise questions of law, as this court has repeatedly decided.

III.

Because the facts specially found by the Circuit Court (Record, p. 7) were not sufficient to support a judgment for the respondent, but required a judgment for the petitioner, in accordance with the repeated decisions of this Court and of the Supreme Court of Kansas, that a judgment against a corporation is conclusive on the stockholder in the absence of fraud and collusion.

Wherefore your petitioner prays that a writ of certiorari may be issued from this court to said United States Circuit Court of Appeals for the First Circuit, and that the record therein of the case above referred to may be thereby brought before this court, and that this court will consider the same and will grant such other and further relief as law and justice may require.

HENRY L. WARD,
Treasurer.

UNITED STATES OF AMERICA,
STATE AND DISTRICT OF VERMONT.
CHITTENDEN, SS.

BURLINGTON, Jan 29, 1901.

Personally appeared before me, a Notary Public, within and for said County and State, the above-named Henry L. Ward, Treasurer, and made due oath that the allegations of the foregoing petition subscribed by him are true to the best of his knowledge, information, and belief.

Witness my hand and notarial seal at said Burlington, the day and year above written.

George H. Marsh.
Notary Public.

I, William Reed Bigelow, having been duly admitted to practice in the Supreme Court of the United States, as an attorney and counsellor of the court, do hereby certify that the foregoing petition for a writ of certiorari has been examined by me and that in my opinion, for the reasons therein set forth, the writ ought to issue as prayed for.

WILLIAM REED BIGELOW.

BOSTON, MASSACHUSETTS,
JANUARY 22, 1901.

Supreme Court of the United States.

October Term, 1900. No. 558.

HENRY L. WARD, TREASURER, *Petitioner*,

v.

EDWARD JOSLIN, *Respondent*.

IN THE MATTER OF THE PETITION OF

HENRY L. WARD, TREASURER,

FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF IN SUPPORT OF PETITION

STATEMENT OF THE CASE.

THIS is a suit by a judgment creditor of a corporation organized under the laws of Kansas to enforce against a stockholder in that corporation the liability prescribed by Article XII., Section 2, of the Constitution of Kansas, and by paragraph 1192 of the General Statutes of Kansas of 1889.

Article XII., Section 2, of the Constitution of Kansas is as follows: —

"Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder; and such other means as shall be provided by law; and such individual liability shall not apply to railroad corporations nor corporations for religious or charitable purposes."

Paragraph 1192 is as follows: —

"If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder, except upon an order of the court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and, upon such motion, such court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

The Western Investment Loan and Trust Company (hereinafter referred to as the Trust Company) was not a railway or a religious or charitable corporation, but was organized for the purposes set forth in its charter (Record, p. 38) as follows: "To buy and sell personal property, including stocks, bonds, bills, notes, real and chattel mortgages, and choses in action of every kind and description, and to transact the business of a loan and trust company."

This case was begun on December 15, 1896, by an attachment in an action of debt, and was entered in the Circuit Court of the United States for the District of New Hampshire on May 8, 1897. The petitioner was the original plaintiff. The respondent in his answer set up "that the claim against the Trust Company, upon which a judgment in favor of the plaintiff against said company was founded, was not a due from or debt of said corporation for which the defendant as a stockholder in said corporation was liable under the constitution and laws of Kansas" (Record, pp. 36, 37); and also that the Trust Company "never had any authority to endorse the said promissory notes and obligations in the second count in plaintiff's declaration described or to guarantee the payment of said notes and obligations" (p. 37). The petitioner seeks to recover only on the first count of his declaration (Record, pp. 29–31).

The respondent testified that he became the owner in 1888 of one hundred shares of the Trust Company of a par value of fifty dollars each, and transferred them in 1894 to his grandson, without consideration, and under circumstances which showed that the transfer was colorable (Petition, paragraph 7). The Circuit Court found as a fact "that the transfer was not such a *bona fide* transfer as to relieve the defendant from his individual liability as a stockholder if he were otherwise liable" (Record, p. 7).

The petitioner's judgment against the Trust Company was recovered upon the guaranty of three notes of twenty-five hundred dollars each. These notes were made by S. S. Hite and his wife, dated September 12, 1888, and payable on September 12, 1892, to J. E. Ethell at the office of the Trust Company in Topeka, Kans. (Record, p. 86). They were endorsed to the petitioner by Ethell "without recourse," and at the same time (p. 80) were guaranteed by the Trust Company as follows (p. 87):—

"TOPEKA, KANS., May 9, A.D. 1889.

"For a valuable consideration, The Western Investment Loan and Trust Company hereby guarantees payment of the within obligation, both principal and interest at maturity.

"THE WESTERN INVESTMENT LOAN AND TRUST COMPANY,

"By L. L. TURNER, *President*.

"Attest: SAM'L T. HOWE, *Secretary*.

"Negotiated by The Western Investment Loan and Trust Company, Topeka, Kans."

These three notes were secured by a trust deed from S. S. Hite and wife to one C. F. Jilson as trustee, and the Trust Company as a third party (Record, pp. 88–91). The Trust Company had the exclusive right under this deed to declare the notes due upon any default, to demand the foreclosure of the mortgage by Jilson, and to receive the proceeds of the mortgage to protect it on its guaranties.

The directors of the Trust Company had a meeting on August 7, 1888, and voted that the president and secretary be authorized to guarantee the payment of all securities negotiated by the company in one of three forms (Record, p. 55), the second of which was identical with the guaranty on the above notes, excepting that Form 2 authorized the guaranty of payment "within days after maturity" instead of "at maturity" as appeared in the notes.

Due service of the petitioner's writ was made on the president of the Trust Company (Record, pp. 7, 93), and judgment was recovered by default on March 7, 1893, in the District Court of Smith County in Kansas, for $9,787.50 and interest at 12 per cent. (p. 96). A payment was made on December 11, 1893, of $4,924.75. An execution issued for the balance and on October 31, 1896, was returned wholly unsatisfied (p. 100). No evidence of *ultra vires* was offered by the respondent, and none appeared except what may be argued from the record of the petitioner's judgment against the Trust Company.

The Circuit Court made a finding of facts (Record, pp. 7, 8), that the petitioner had a valid judgment against the Trust Company with execution thereon returned wholly unsatisfied; that the respondent was a stockholder for five thousand dollars; that the petitioner's judgment was based "upon a guaranty, given upon a valuable consideration, of the payment of certain promissory notes from one third party to another, and was not a guaranty of the payment of securities negotiated by the company"; that this guaranty was not within the scope of the business of the Trust Company; and made a general finding for the respondent.

At the argument and before the findings of the Circuit Court the petitioner presented to the court in a printed brief five propositions of law and requested the ruling of the court thereon. The court considered these propositions but declined to give them, as appears from the declaration of law (Record, pp. 20–22), and the petitioner then excepted to the refusal of the court to adopt them in this case, and these exceptions were allowed (Record, pp. 10–14).

Assignments of Error.

The assignments of error which are material to this petition are as follows (Record, pp. 16, 17, 19): —

1. The Circuit Court erred in refusing to rule, and to adopt in the decision of this case, the proposition of law duly presented by the plaintiff, that —

"Upon all the evidence in the case the plaintiff is entitled to recover as a matter of law, and a finding should be made for the plaintiff for the full sum claimed in his declaration."

2. The Circuit Court erred in refusing to rule, and to adopt in the decision of this case, the proposition of law duly presented by the plaintiff, that —

"The execution in evidence in this case is an execution against the effects of a corporation within the meaning of paragraph 1192 of the General Statutes of Kansas, 1889."

3. The Circuit Court erred in refusing to rule, and to adopt in the decision of this case, the proposition of law duly presented by the plaintiff, that —

"The judgment and execution against The Western Investment Loan and Trust Company in evidence are included in the word 'dues' in Article XII., Section 2, of the Constitution of Kansas, and constitute such a 'due' as is secured by the individual liability of stockholders in corporations organized under the laws of Kansas."

4. The Circuit Court erred in refusing to rule, and to adopt in the decision of this case, the proposition of law duly presented by the plaintiff, that —

"The guaranties of said corporation, which are declared on in the plaintiff's second, fourth and sixth causes of action in his suit against said corporation, as appears from the record in evidence, were not *ultra vires* or beyond the power of said corporation to make."

5. The Circuit Court erred in refusing to rule, and to adopt in the decision of this case, the proposition of law duly presented by the plaintiff, that—

"If the court finds that said guaranties of said corporation were *ultra vires* and beyond the power of said corporation to make, that is no defence in this action."

13. The Circuit Court erred in not giving full faith and credit to the plaintiff's judgment and execution against The Western Investment Loan and Trust Company in evidence, as required by Article IV., Section 1, of the Constitution of the United States, and Section 905 of the Revised Statutes of the United States.

14. The Circuit Court erred in ruling that the facts specially found by the Court were sufficient to support a judgment for the defendant.

15. The Circuit Court erred upon the face of the record in entering judgment for the defendant.

Grounds for Requesting a Writ of Certiorari.

General Grounds.

Your petitioner would call attention to the essential identity of this case with the case of Whitman *v.* National Bank of Oxford, 176 U.S. 559. Both are cases by judgment creditors of Kansas corporations to enforce against individual stockholders the liability imposed by paragraph 1192 of the General Statutes of Kansas of 1889. In that case there was involved about $4,200; in this case there is involved, including interest, over $6,200. In that case the Kansas corporation was held liable upon two notes made payable to the order of "J. L. Huey, Cash.," and bearing a written guaranty of payment (with no other endorsement) signed "Arkansas City Investment Co., Arkansas City, Kansas. J. L. Huey, Cash."; in this case the Trust Company was held liable upon three notes made payable to Ethell, endorsed by him "without recourse," and at the same time guaranteed by the Trust Company for a valuable consideration. That case was certified to this Court after judgment

for the creditor, at a time when every federal court which had passed upon the question (in eight decisions) had held without exception that the creditor could recover in such an action. This is the first reported case in any federal court which has held that under such circumstances the creditor could not recover. In that case this Court affirmed the judgment of the Court of Appeals for the Second Circuit in favor of the creditor; in this case the Court of Appeals for the First Circuit has refused to follow that decision of this Court and has found for the stockholder. This is certainly a case of greater novelty than the case of Whitman *v.* Bank of Oxford, and involves principles equally as important.

Special Grounds.

The special grounds upon which your petitioner asks for this writ are three: —

1. Because this is a case of peculiar gravity and of general importance for the reason that the United States Circuit Court of Appeals for the First Circuit has absolutely declined to adopt and follow rulings of law established by this Court in each instance by repeated decisions upon eight specific points which will be set out and discussed separately hereafter.

2. Because the United States Circuit Court of Appeals for the First Circuit rested its decision against your petitioner upon the sole ground that the guaranties of the Trust Company, upon which his judgment against that company was recovered, were *ultra vires*, whereas there is no evidence in the case tending to show that those guaranties were *ultra vires*. That Court declined to inspect the record upon this question, although it was duly presented in the petitioner's first and fourth assignments of error.

3. Because the facts specially found by the Circuit Court were not sufficient to support a judgment for the respondent, but required a judgment for the petitioner, in accordance with the repeated decisions of this Court and of the Supreme Court of Kansas, that a judgment against a corporation is conclusive on the stockholder in the absence of fraud and collusion.

Points and Authorities.

Ground I.

The Court of Appeals declined to adopt and follow rulings of law established by this Court upon the following points, which were material to the decision.

1.

Exceptions to the rulings of the Court, where jury trial is waived, upon propositions of law duly presented to the Court and considered before the finding, are properly presented to the Circuit Court of Appeals in a bill of exceptions duly allowed by the Circuit Court.

The petitioner asked the Circuit Court for a declaration of law upon the propositions set out in the bill of exceptions, and took exceptions to the refusal of the Court to give the five rulings requested (Assignments of Error 1, 2, 3, 4, 5; Record, pp. 16, 17). These exceptions were allowed, and are not disposed of by the finding of facts.

Norris *v.* Jackson, 9 Wall. 125, 128.
Ins. Co. *v.* Sea, 21 Wall. 158, 160.
Lehnen *v.* Dickson, 148 U.S. 71, 73.
Mercantile Trust Co. *v.* Wood, 60 Fed. Rep. 346, 348; 8 C. C. A. 658.
Clement *v.* Phenix Ins. Co., 7 Blatchf. 51, 53.

The refusal of the Circuit Court to adopt these propositions in the decision of this case gives the petitioner a right of exception. These exceptions should have been passed on by the Court of Appeals.

2.

The refusal of the Circuit Court to rule that upon all the evidence in the case the plaintiff is entitled to recover as a matter of law, when application for such ruling is made before the finding of the Court, raises a question of law, which, if

exception is taken and preserved in a bill of exceptions, presents a question of law for the decision of the Circuit Court of Appeals.

The petitioner's first assignment of error, upon an exception to the refusal of the Circuit Court to rule that upon all the evidence in the case the petitioner was entitled to recover as a matter of law, raises this question.

St. Louis *v.* W. U. Tel. Co., 148 U.S. 92, 96.
Lehnen *v.* Dickson, 148 U.S. 71, 73.
Ins. Co. *v.* Folsom, 18 Wall. 237, 251.
World's Col. Exp. *v.* France, 96 Fed. Rep. 687, 689; 38 C. C. A. 483.

Any other ruling than that laid down in the above cases would be intolerably oppressive. The Circuit Court found as a fact that the respondent was liable as a stockholder. Unless the respondent has shown that the company's guaranties were *ultra vires* his case must fall to the ground. There is no evidence of it.

3.

A "judgment is not only conclusive as to what was actually determined respecting such demand, but as to every matter which might have been brought forward and determined respecting it."

Mr. Justice Field in Davis *v.* Brown, 94 U.S. 423, 428.
Cromwell *v.* Co. of Sac, *Ibid.*, 351, 352.
Keokuk Railroad *v.* Missouri, 152 U.S. 301, 315, and cases cited.
Comstock *v.* Crawford, 3 Wall. 396, 406.
Grignon *v.* Astor, 2 How. 319, 340.

"What is implied in a record, pleading, will, deed, or contract is as effectual as what is expressed."

Mr. Justice Swayne in Cornett *v.* Williams, 20 Wall. 226, 250, 251.
U.S. *v.* Babbitt, 1 Black, 51, 61.

The conclusiveness of a judgment does not depend upon the reasons for the judgment, but upon the fact of a judgment.

So. Pac. R.R. *v.* U.S., 168 U.S. 1, 48–52, and cases cited.
Citizens' Bank *v.* Brigham, 61 Kans. 727.

A judgment by default is just as conclusive as one rendered after answer and contest.

Last Chance Mining Co. *v.* Tyler Min. Co., 157 U.S. 683, 691.

A judgment against a corporation is conclusive, although based upon a claim which was absolutely *ultra vires*.

Franklin Co. *v.* German Bank, 142 U.S. 93.
U.S. *v.* New Orleans, 98 U.S. 381, 395, 397.
Wilson's Executor *v.* Deen, 121 U.S. 525, 534.
Board of Com'rs *v.* Platt, 79 Fed. Rep. 567, 572; 25 C. C. A. 87, 91.
Ætna Ins. Co. *v.* Lyon Co., 44 Fed. Rep. 329, 344.
U.S. *v.* Board of Auditors, 28 Fed. Rep. 407.

A judgment is binding although the claim was barred by a discharge in bankruptcy which was not pleaded.

Dimock *v.* Revere Copper Co., 117 U.S. 559.

If the pleadings show that the cause of action was barred by the statute of limitations, a stockholder cannot set that up when sued on the judgment.

Schnack *v.* Boyd, 59 Kans. 275, 278.
Head *v.* Daniels, 38 Kans. 1, 5.

So also if usury might have been pleaded as a good defence but was not.

Charles *v.* Davis, 62 N.H. 375.

A foreclosure decree is binding upon parties and privies as to defences not set up.

Stout *v.* Lye, 103 U.S. 66.

It was alleged in the petitioner's declaration against the Trust Company that said "Trust Company, for value and in writing guaranteed the payment" of the notes (Record, p. 80). The making of the guaranties was an essential to the plaintiff's recovery of judgment. That judgment is certainly conclusive on the Trust Company.

4.

A stockholder "is so far an integral part of the corporation, that, in the view of the law, he is privy to the proceedings touching the body of which he is a member," and a judgment against a corporation is binding on its stockholders in the absence of fraud and collusion.

This is the law of this Court.

Hawkins *v.* Glenn, 131 U.S. 319, 329, and cases cited.
Hancock Bank *v.* Farnum, 176 U.S. 640, and cases cited.
Graham *v.* Railroad, 118 U.S. 161, 179.

It is the law of Kansas.

Ball *v.* Reese, 58 Kans. 614.
Steffins *v.* Gurney, 61 Kans. 292, 294, 295.
Thompson *v.* Pfeiffer, 60 Kans. 409, 420.

It is the law almost universally, and has hitherto been the law of the First Circuit.

Hale *v.* Hardon, 95 Fed. Rep. 747, 757, 758, and cases cited; 37 C. C. A. 240.
Dexter *v.* Edmands, 89 Fed. Rep. 467.

It is immaterial that the judgment was rendered by default.

Steffins *v.* Gurney, 61 Kans. 292, 295.
Guerney *v.* Moore, 131 Mo. 650, 667.
Hale *v.* Hardon, 95 Fed. Rep. p. 760.
Holyoke Bank *v.* Goodman Co., 9 Cush. 576, 584.
Gaskill *v.* Dudley, 6 Met. 546.
Milliken *v.* Whitehouse, 49 Maine, 527, 529.
Came *v.* Brigham, 39 Maine, 35.
Hanson *v.* Davison, 73 Minn. 454.
Wilson *v.* Stockholders, 43 Pa. St. 424.

This rule has no application to the case of fraudulent conveyances (Record, p. 112). The grantee of a fraudulent conveyance is allowed to dispute a judgment against his grantor in favor of a creditor who seeks to set aside the conveyance for the very reason that the grantee is not a party or privy to that judgment.

"The tenant was not a party or privy to that suit, and is not concluded by the judgment."

Endicott, J., in Tarbell *v.* Jewett, 129 Mass. 457, 459.

Clearly, if the corporation is estopped by this judgment, the stockholder is also estopped because he is in privity with the corporation.

"'Hence, all privies, whether in estate, in blood, or in law, are estopped from litigating that which is conclusive on him

with whom they are in privity.' The correctness of this statement has been often affirmed by this Court: Lovejoy *v.* Murray, 3 Wall. 1, 19; Robbins *v.* Chicago City, 4 Wall. 657, 673; and the principle has been recognized in many cases. Indeed it is elementary."

Chief Justice Waite in Litchfield *v.* Goodnow, 123 U.S. 549, 551.

No fraud or collusion is claimed in this case. If the respondent had apprehended any fraud, collusion, or dereliction of duty in the officers of the Trust Company, knowing as he did that the corporation was in financial straits and had not declared a dividend for two and a half years prior to the petitioner's suit against the company, he had the right to intervene and defend in that suit.

Fitzwater *v.* National Bank, 61 Pac. Rep. 684 (Kans.). Mining Co. *v.* McKibben, 60 Kans. 387.

The Circuit Court found that these guaranties were "given upon a valuable consideration" (Record, p. 7). It is clear that the petitioner could recover back that consideration, either directly on the theory of estoppel, or by an action of *quantum meruit*.

Central Trans. Co. *v.* Pullman Co., 139 U.S. 24, 57–61; 171 U.S. 138, 150, 151.

The following paragraphs of the compiled laws of Kansas of 1885 show what the petitioner's rights were in the courts of Kansas with reference to his claim: —

"(3803) Section 10. The distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing are abolished; and in their place there shall be, hereafter, but one form of action, which shall be called a civil action."

"(3886) Section 87. The petition must contain;
"*Second.* A statement of the facts constituting the cause of action, in ordinary and concise language and without repetition."

"(3938) Section 139. The Court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding by adding or striking out the name of any party, or correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or conform the pleading or proceeding to the facts proved, when such amendment does not change substantially the claim or defence; and when any proceeding fails to conform, in any respect, to the provisions of this code, the Court may permit the same to be made conformable thereto by amendment."

The corresponding paragraphs in the General Statutes of Kansas of 1889 are respectively paragraphs 4087, 4170, and 4222.

If the Trust Company had answered to the petitioner's suit and claimed that the guaranties were *ultra vires*, the petitioner might then have set out any facts necessary to permit him to recover substantially for a *quantum meruit*. It must be presumed that the consideration paid the Trust Company for its guaranties was the amount which the petitioner recovered in his judgment against that company. The Trust Company and its stockholders have had the benefit of that money. There is certainly no equity in favor of the respondent stockholder which should permit him to impeach that judgment.

5.

"The power which can give authority to act can ratify any act that is taken, and generally legislative recognition of an act or a corporation validates the act or the corporation, although neither one nor the other may have had full prior legal authority."

Mr. Justice Brewer in Street *v.* U.S., 133 U.S. 299, 307.
Comanche County *v.* Lewis, *Ibid.* 198, 202.
City Railway Co. *v.* Citizens Co., 166 U.S. 557, 569.

"It is a general principle of almost universal application, that whenever a state, county, corporation, partnership, or person has power originally to do a particular act, it also has the power to ratify and make valid an attempted effort to do such act, although the same may have been done ever so defectively, informally, or even fraudulently in the first instance."

Valentine, J., in State *v.* Com'rs of Pawnee Co., 12 Kans. 426, 439.
State *v.* Stevens, 21 Kans. 210, 215.
State *v.* Hamilton, 40 Kans. 323, 333.

Chapter 23, Article 3, Section 15, of the Compiled Laws of Kansas of 1885 is as follows: —

"Section 15. Corporations shall have power to borrow money on the credit of the corporation, not exceeding its authorized capital stock, and may execute bonds or promissory notes therefor, and may pledge the property and income of the corporation."

This was amended by Chapter 109, Section 1, of the laws of Kansas for 1889 by adding thereto the following: —

"Provided, however, that the provisions of this section shall not apply to the debentures or bonds of any loan or trust company, duly incorporated under the provisions of this chapter, the payment of which debentures or bonds shall be secured by a transfer of real estate or by other securities for the benefit and protection of purchasers of said debentures or bonds; such collateral to be at least equal in amount to the par value of such bonds or debentures, and all real estate mortgage securities to be first liens on the property on which loans are made."

This act recognizes and ratifies the right of loan and trust companies to issue debenture bonds secured by first mortgages on real estate. A debenture bond is practically "a note of a corporation secured by the securities as collateral; in other words, it is a note secured by the pledge of securities."

Cook on Corporations, 4th ed., vol. 2, sect. 776, p. 1777.

"The name is not of the slightest consequence."

Schofield, J., in Ward *v.* Johnson, 95 Ill. 215, 239.

There is no real distinction between such debenture bonds and the guaranties of the Trust Company in this case. The guaranties are obligations in the name of the Trust Company secured by a real estate mortgage and also by the signatures of the makers of the notes. The guaranties were made on May 9, 1889 (Record, p. 87), and were therefore fully authorized by the act which took effect on March 14, 1889. The charter of the Trust Company is broad enough to cover such choses in action as these guaranties secured by real estate.

Parkinson *v.* Bank, 60 Kans. 474, 477.
McCormick *v.* Market Bank, 165 U.S. 538, 550.

6.

"When a contract is not on its face necessarily beyond the scope of the power of the corporation by which it was made, it will, in the absence of proof to the contrary, be presumed to be valid."

Mr. Justice Swayne in Railroad *v.* McCarthy, 96 U.S. 258, 267.
Lexington *v.* Butler, 14 Wall. 282, 296.
Louisville R.R. *v.* Louisville Trust Co., 174 U.S. 552, 573.
Fuller *v.* Scott, 8 Kans. 25.
Waynick *v.* Richmond, 11 Kans. 488.
Bissell *v.* Railroad, 22 N.Y. 258, 290.
Monument Bank *v.* Globe Works, 101 Mass. 57.
Manufacturing Co. *v.* Canney, 54 N.H. 295, 324–327.
Chautauqua Bank *v.* Risley, 19 N.Y. 369, 381, 382.
Farmers Loan Co. *v.* Curtis, 7 N.Y. 466, 470, 471.
Alward *v.* Holmes, 10 Abbott, N.C. 96, 99, 102.
Roussin *v.* St. Louis Ins. Co., 15 Mo. 244, 248.

Hart *v.* Ins. Co., 21 Mo. 91, 93.
McIntire *v.* Preston, 10 Ill. 48, 62.
Union Water Co. *v.* Fluming Co., 22 Calif. 620, 628, 629.

The judgment record shows that the notes were negotiated by Ethell (pp. 79–87). It does not show that Ethell did not negotiate them for the benefit of the Trust Company.

It is not *ultra vires* for a banking institution to put assets into the name of an individual as trustee.

Schofield *v.* State Bank, 97 Fed. Rep. 282; 38 C. C. A. 179.

It is conceded to be the general rule that "banking institutions may guarantee paper owned by them when they negotiate it" (Record, p. 110). The reason of the rule applies with equal force when the obligation is in the name of an individual but in trust for and for the benefit of the company. If negotiated by a trustee for the benefit of the company it may be guaranteed by the company upon negotiation.

Talman *v.* Rochester Bank, 18 Barb. (N.Y.) 123.
Lyon *v.* First National Bank, 85 Fed. Rep. 120, 122; 29 C. C. A. 45, 47, 48.
Opdyke *v.* Railroad, 3 Dillon, 55, 72, 73.
Marbury *v.* Kentucky Land Co., 62 Fed. Rep. 335, 347, 350; 10 C. C. A. 393, 406.
Baxter *v.* Washburn, 8 Lea (Tenn.) 1, 15, 16.
Rogers Works *v.* Southern Association, 34 Fed. Rep. 278, 281.
New York Trust Co. *v.* Lombard Investment Co., 73 Fed. Rep. 537, 549.
See also Railroad *v.* Howard, 7 Wall. 392, 412.
Green Bay R.R. *v.* Steamboat Co., 107 U.S. 98.
National Bank *v.* Mathews, 98 U.S. 621, 626.
National Bank *v.* Whitney, 103 U.S. 99, 101.
Fort Worth Co. *v.* Smith Bridge Co., 151 U.S. 294, 301.

It necessarily follows from the above cases that evidence to show all the circumstances might have been given to rebut the claim of *ultra vires*.

See also Ford *v.* Williams, 21 How. 287.
Steam Navigation Co. *v.* Bank, 6 How. 344, 380, 381.
Baldwin *v.* Bank, 1 Wall. 234, 240, 241.
Jones *v.* Guaranty Co., 101 U.S. 622, 631.
Calif. Ins. Co. *v.* Union Co., 133 U.S. 387, 409.
Holmes *v.* Goldsmith, 147 U.S. 150, 160.
Scantlin *v.* Allison, 12 Kans. 85.

It was not necessary to do this, however, as the contract is presumed to be valid and there is no evidence to the contrary.

7.

A holder of negotiable paper for value and before maturity is presumed to be a *bona fide* holder.

Lexington *v.* Butler, 14 Wall. 282.
Carpenter *v.* Longan, 16 Wall. 271.
Chambers Co. *v.* Clews, 21 Wall. 317, 323.
San Antonio *v.* Mehaffy, 96 U.S. 312.
Louisville R.R. *v.* Louisville Trust Co., 174 U.S. 552, 575.

The record shows that the petitioner is a holder for value and before maturity (Record, p. 80), and in the absence of evidence affecting the validity of the guaranties he is presumed to be a *bona fide* holder. The Court of Appeals in the decision (p. 112) denies this and says: "But, on the pleadings in the original suit in the case at bar, the present plaintiff had notice, because the guaranties of the corporation were a part of the transaction of his obtaining the notes."

This reasoning assumes that the judgment is not conclusive either against the respondent or the Trust Company. It assumes further that there could be no possible circumstances whereby the guaranties could be valid, such, for instance, as the interpretation by the courts of Kansas that the act of March 14, 1889, applied to this case and authorized the guaranties; or that Ethell might have negotiated the notes only as trustee for the Trust Company and for its benefit, and that the guaranties in that case would be valid; or that the guaranties came within the charter powers of the Trust Company "to buy and sell personal property," and "choses in action of every kind and description"; or that the court of Kansas would not hold such guaranties invalid under any circumstances. The Court of Appeals should have made all these presumptions in favor of the petitioner, but in the decision it made every presumption against him.

8.

"Acts done by the corporation which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter."

Mr. Justice Story in Bank *v.* Dandridge, 12 Wheat. 64, 70.

Approved and applied as a general rule in the following cases: —

Broome *v.* U.S., 15 How. 143, 155.
Supervisors *v.* Schenck, 5 Wall. 772, 782.
Davis *v.* Gray, 16 Wall. 203, 217.
McNitt *v.* Turner, *Ibid.*, 352, 363, 364.
Carpenter *v.* Rannels, 19 Wall. 138, 146.
Cornett *v.* Williams, 20 Wall. 226, 249, 250.
Keely *v.* Sanders, 99 U.S. 441, 447.
Railroad *v.* Keokuk Company, 131 U.S. 371, 381.
Knox County *v.* National Bank, 147 U.S. 91, 97.
City Railroad *v.* Citizens Railroad, 166 U.S. 557, 569.

It was not necessary for the petitioner to offer evidence additional to the record of his judgment against the Trust Company in order to show that he had valid claims against that company on its guaranties. If, in order to sustain the legality of those guaranties, other facts must exist, such as the fact that Ethell negotiated the notes guaranteed only as trustee for and for the benefit of the Trust Company, then those facts are presumptively proved by the act of the Trust Company in making the guaranties. It is presumed that the company acted lawfully and not *ultra vires*.

SUMMARY OF GROUND I.

The petitioner claims that his judgment against the Trust Company is conclusive proof that the guaranties of that company were valid; that it is conclusive against the respondent, who is a stockholder and in privity with the company, because there is no evidence of fraud or collusion in procuring the judgment, and because the Circuit Court found as a fact that the guaranties were "given upon a valuable consideration," and the respondent shows no equity which can permit him to impeach that judgment; that the guaranties were authorized by chapter 109 of the laws of Kansas of 1889, and were recognized as valid by the Legislature of Kansas in that act; that on the face of the record the guaranties do not appear to be necessarily beyond the scope of the power of the corporation; that the petitioner is a *bona fide* holder of the guaranties; and that the act of the Trust Company in making the guaranties is presumptive proof of any facts necessary to make them legally operative.

These presumptions depend upon rules of law repeatedly laid down by this Court. Those rules of law were called to the attention of the Circuit Court and Circuit Court of Appeals, but were not adopted by those courts. The Court of Appeals, on the contrary, ruled as follows (Record, p. 114):—

"In this connection, it should be observed that the plaintiff refers to certain cases by virtue of which he maintains that there is a presumption that the guaranties were within the powers of the corporation, and of its officers who executed them. These, however, only sustain the rule stated in Express Com-

pany *v.* Railroad Company, 99 U.S. 191, 199, and concern merely the question of presumption, and the necessity of offering proof before a defence is made. They have no relation to a conclusive presumption, nor any pertinency when the true facts of the case are reached, as they are at bar."

But there is no evidence in this case concerning these facts except the record evidence of the petitioner's judgment (pp. 79–101), the charter of the company (p. 38), and the directors' vote (p. 55). The Court of Appeals reaches its conclusion, therefore, by declining to investigate the record, as required by the petitioner's first and fourth requests for rulings, to see whether the findings are supported by any evidence. As there is no such evidence, the presumptions invoked by the petitioner have full force, and he is entitled to judgment.

It would be an intolerable injustice for any suitor in any court to be deprived of a judgment to which he is entitled by a finding of fact which has no legal evidence whatever to support it. Your petitioner comes to this Court because he has challenged the sufficiency of the evidence, as a matter of law, in the Circuit Court and Court of Appeals, relying on the decisions of this Court that such a question is a matter of law. No stronger appeal can be made to this Court for the writ of *certiorari* than the allegation that the Circuit Court and Circuit Court of Appeals have declined to adopt and apply principles of law established by this Court. This Court has recognized that conflicting decisions of the inferior courts constitute a sufficient ground for issuing this writ. It is of far greater importance that the decisions of inferior tribunals shall not conflict with the established rules of decision in this Court. Such a conflict is destructive of all judicial authority.

Forsyth *v.* Hammond, 166 U.S. 506, 515.

Ground II.

Because the Court of Appeals rested its decision against your petitioner upon the sole ground that the guaranties of the Trust Company, upon which his judgment against that company was

recovered, were *ultra vires*, whereas there is no evidence in the case tending to show that those guaranties were *ultra vires*.

The evidence in the case consists of the deposition of the respondent and his grandson (Record, pp. 64–78), which relates entirely to proof that the respondent is a stockholder in the Trust Company; the deposition of James A. Troutman (pp. 40–63), which relates chiefly to the same issue but also identifies the records of the Trust Company; and the record evidence, which consists of the charter (p. 38), by-laws (pp. 50–53), and minutes (pp. 53–60) of the Trust Company, and the petitioner's judgment and execution against that company (pp. 79–101). There is not a scintilla of evidence tending to show that the company's guaranties were *ultra vires* in any of the depositions nor in the record evidence, except what may be argued from the judgment record. That is no evidence of *ultra vires*.

The petitioner claims that the presumptions established by this Court as already argued preclude the respondent from taking advantage of his plea of *ultra vires*. The propositions argued under points 5, 6, 7, and 8 of Ground I. conclusively establish that the guaranties of the Trust Company must be presumed to be valid in the utter absence of evidence to the contrary. The propositions argued under points 3 and 4 of Ground I. conclusively establish that the petitioner's judgment upon those guaranties is final both against the Trust Company and the respondent. The petitioner's suit is based upon a judgment and execution against the Trust Company which are expressly declared to be valid, and is to enforce a liability against the respondent, who is expressly declared to be a stockholder, and no evidence is offered to impeach that judgment. A judgment conclusively establishing that the petitioner's claim is valid against the Trust Company is not evidence that his claim is *ultra vires*. A judgment does not impeach itself.

Your petitioner has faithfully followed the precedents established by this Court, and has preserved his rights in exact conformity with those precedents. He presented his requests for rulings to the Circuit Court at the argument and before the finding, to the effect that he was entitled to recover as a matter of law upon all the evidence, and that the guaranties were not

ultra vires. Those rulings were not given, and he excepted, and his exceptions were allowed (Record, pp. 11, 12, and Assignments of Error, 1 and 4). Upon the authorities already cited under points 1 and 2 of Ground I. it is clear that the petitioner's rights are preserved by his exceptions.

Not only is the judgment record no evidence of *ultra vires*, but on the face of the record it appears affirmatively that the guaranties were negotiated by Ethell entirely for the benefit of the Trust Company; that record shows that the notes in question were endorsed by Ethell "without recourse" (Record, p. 87); "that at the time of the endorsement of said notes to this plaintiff" the Trust Company guaranteed the payment of them for value (p. 80); that they were payable at the office of the Trust Company (p. 86); that the mortgage deed given to secure the notes ran to a trustee for the benefit of the Trust Company (pp. 88–90); and that the Trust Company had the exclusive right to declare the notes due upon any default, to demand the foreclosure of the mortgage, and to receive the proceeds of the mortgage to protect it on its guaranties (p. 90).

This Court has held that there is no inference that an endorsement "without recourse" is for value paid to the endorser.

"Nor under this endorsement, which is an assignment of the note without expressing value received, and that, too, without recourse against the assignor, can it be fairly inferred that the nominal value of the note was actually paid."

> Chief Justice Marshall in Welch *v.* Lindo, 7 Cranch, 159, 163.
> See Robinson *v.* Lincoln, 5 Met. (Mass.) 201, 204.

The guaranties are expressed to be for a valuable consideration. It is a fair inference from the foregoing facts that the value was paid to the Trust Company at the time these notes were negotiated and guaranteed, and that the Trust Company was the party beneficially interested in the transaction. The vote of the directors (Record, p. 55) authorized the guaranty

of "securities negotiated by the company." The presumption must be that these securities were really negotiated by the company, in the absence of evidence to the contrary. They are endorsed "Negotiated by The Western Investment Loan and Trust Company, Topeka, Kansas" (p. 87).

The notes and mortgage deed are to be construed together.

Moline Plow Co. *v.* Webb, 141 U.S. 616, 625.

The Trust Company seems to have followed the usual course of business in Kansas.

Crissey *v.* Loan Co., 59 Kans. 561, 562.
See Van Pelt *v.* Strickland, 60 Kans. 584.

In addition to the statutes already cited, the petitioner would call attention to the following paragraphs of the Compiled Laws of Kansas of 1885: —

"(1136) Section 11. Every corporation, as such, has power:
"*Sixth.* To make by-laws, not inconsistent with existing laws, for the management of its property, the regulation of its affairs, and for the transfer of its stock.
"*Seventh.* To enter into any obligation or contract essential to the transaction of its ordinary affairs."

The following decisions of the Supreme Court of Kansas seem to sustain the petitioner's position: —

Commercial Bank *v.* Provident Institution, 59 Kans. 361, 365, and cases cited.
Railroad *v.* Johnson, 58 Kans. 175.
Railroad *v.* Fletcher, 35 Kans. 236, 250.

The case of Commercial Bank *v.* Provident Institution, in particular, seems to imply that if the guaranty is made in the interest of the bank it would not be *ultra vires*, and, in any

event, that every presumption should be made in its favor. It is difficult to follow the reasoning of the Court of Appeals construing that decision into an authority against the petitioner (Record, pp. 109, 110).

The Court of Appeals did not give full faith and credit to the petitioner's judgment (13th Assignment of Error, Record, p. 19).

Hancock Bank *v.* Farnum, 176 U.S. 640.

That case had not been decided when this case was decided in the Circuit Court.

Upon the facts stated in paragraph 7 of the petition for this writ it is clear that the Circuit Court was bound to find that the transfer by the respondent to his grandson was colorable. Indeed, this is not disputed.

Van Demark *v.* Barons, 52 Kans. 779, 782.
Johnston *v.* Laflin, 5 Dillon, 65. Affirmed in 103 U.S. 800.
National Bank *v.* Case, 99 U.S. 628.
Bowden *v.* Jones, 107 U.S. 251.
Pauly *v.* Trust Co., 165 U.S. 606, 619.
Stuart *v.* Hayden, 169 U.S. 1, 9.
Foster *v.* Lincoln, 79 Fed. Rep. 170; 24 C. C. A. 470.
Cox *v.* Montague, 78 Fed. Rep. 845; 24 C. C. A. 364.
Houghton *v.* Hubbell, 91 Fed. Rep. 453; 33 C. C. A. 574.
Cory *v.* Morrill, 71 Vt. 51, 57.
Rider *v.* Fritchey, 49 Oh. St. 285.
Pinkerton *v.* Railroad, 42 N.H. 424.
Coolidge *v.* Melvin, 42 N.H. 510, 518–522, 530–534.
Gove *v.* Campbell, 62 N.H. 401.

The third assignment of error is an exception to the refusal of the Circuit Court to rule that the judgment and execution against the Trust Company, in evidence, are included in the word "dues" in Article XII., Section 2, of the Constitution of

Kansas, and constitute such a "due" as is secured by the individual liability of stockholders in corporations organized under the laws of Kansas.

It is conceded that the word "dues" includes all contractual obligations (Record, p. 111). This is in accordance with all the authorities.

Whitman *v.* Bank of Oxford, 176 U.S. 559, 563.
Chase *v.* Curtis, 113 U.S. 452, 463.
Rider *v.* Fritchey, 49 Oh. St. 285, 295.
Herrick *v.* Wardwell, 58 Oh. St. 294, 309.
Flenniken *v.* Marshall, 43 So. Carolina, 80, 85.
See also Grund *v.* Tucker, 5 Kans. 70, 77.
Haynes *v.* Brown, 36 N.H. 545, 566.
Smith *v.* Omans, 17 Wisc. 395, 396.
Powell *v.* Oregonian Co., 36 Fed. Rep. 726; 38 Fed. Rep. 187.

It is clear that the guaranties which were the petitioner's original claim against the Trust Company are contractual obligations. Unless the respondent has proved that they are *ultra vires*, and unless he can go behind the petitioner's judgment and assert that as a defence, the petitioner clearly is entitled to recover. The respondent never pleaded *ultra vires* as a defence to the petitioner's first count (Record, p. 37), which is all that is relied on.

The second assignment of error is an exception to the refusal of the Circuit Court to rule that the execution in evidence in this case is an execution against the effects of a corporation within the meaning of paragraph 1192 of the General Statutes of Kansas, 1889.

This raises a question which is not limited to the interpretation of the word "dues" in the constitution of Kansas. The constitutional provision, Article XII., Section 2, is mandatory, or at least directory, on the Legislature of Kansas; but it is not a limitation on the power of the Legislature to impose any liability it sees fit upon stockholders in corporations other than railways or religious or charitable corporations.

"The Constitution contains no grant of powers to the Legislature. It is only a limitation on the exercise of its authority; and the Legislature, in its discretion, has the right to pass any act not violative of the state or federal constitutions."

Horton, C. J., in Castle *v.* Houston, 19 Kans. 417, 427.
Leavenworth Co. *v.* Miller, 7 Kans. 479.
Cooper *v.* Telfair, 4 Dallas, 14.
Fletcher *v.* Peck, 6 Cranch, 87, 135, 136.
Bolles *v.* Brimfield, 120 U.S. 759, 761.
Cooley on Constitutional Limitations, 6th ed., pp. 104–106, and cases cited.

If the word "dues" is construed to mean only a certain class of debts, the constitution does not prohibit the Legislature from enacting such laws as it sees fit, to secure all kinds of liabilities from corporations, by making their stockholders liable. It is submitted that this is what the Legislature of Kansas has done in enacting paragraph 1192.

No evidence appears of any circumstances that constitute a defence to the petitioner's case upon the conceded facts.

Ground III.

Because the facts specially found by the Circuit Court were not sufficient to support a judgment for the respondent, but required a judgment for the petitioner. Assignments of error 5, 14, and 15 are applicable to this question.

The errors specified in assignments 14 and 15 would be available to the plaintiff in error though he had filed no bill of exceptions.

Allen *v.* St. Louis Bank, 120 U.S. 20, 30.
Ins. Co. *v.* Boon, 95 U.S. 117, 124.
Tyng *v.* Grinnell, 92 U.S. 467, 469.

The material facts specially found are these (Record, p. 7): The respondent is liable as the owner of one hundred shares of the par value of fifty dollars each in the Trust Company, a corporation organized under the general laws of Kansas, which is not a railway or a charitable or religious corporation. The petitioner in March, 1893, recovered a valid judgment against that company on the guaranty of certain notes for $9,787.50, bearing interest at 12 per cent. On December 11, 1893, $4,924.75 was paid thereon; and on September 15, 1896, execution was issued for the balance and was returned wholly unsatisfied.

Those are all the material facts in the case, and upon those facts the petitioner is entitled to judgment. This Court and the Supreme Court of Kansas have both held that such a judgment and execution are conclusive on the stockholders of the corporation except when obtained by fraud or collusion.

Hancock National Bank *v.* Farnum, 176 U.S. 640.
Ball *v.* Reese, 58 Kans. 614.
Steffins *v.* Gurney, 61 Kans. 292.
Also cases cited under points 3 and 4 of Ground I.

No other exceptions are recognized by the courts of Kansas. "The nature of the liability and the time and the mode of its enforcement are to be determined from the statutes, and not by the notions which particular courts might entertain as to what would be equitable and just in such cases. The provisions of the statute in question, which fix the liability of the stockholder, are plain and leave little room for interpretation."

Johnston, J., in Sleeper *v.* Norris, 59 Kans. 555, 558.

A judgment on an *ultra vires* claim is just as conclusive as a judgment on any other claim.

Franklin Co. *v.* German Bank, 142 U.S. 93.
U.S. *v.* New Orleans, 98 U.S. 381, 395, 397.
Board of Com'rs *v.* Platt, 79 Fed. Rep. 567, 572;
25 C. C. A. 87, 91.

The Supreme Court of Kansas has construed the constitutional and statutory provisions which create this liability, and that construction is binding on all other courts. Inasmuch as the decision of the Court of Appeals is in conflict with that construction, this is pre-eminently a case which should be certified to this Court for correction.

Forsyth *v.* Hammond, 166 U.S. 506, 515.

It is immaterial in this action whether the securities guaranteed were negotiated by the corporation or not. The finding that the guaranties sued on were not within the scope of the director's resolution (Record, p. 8) is immaterial after judgment on the guaranties. But comparing the guaranty (Record, p. 87) with the resolution (p. 55) shows that Form 2 authorizes payment "within days after maturity," while the guaranties on the notes guarantee payment "at maturity." Form 2 would authorize a guaranty of payment one day after maturity, while the actual obligation authorizes payment one day earlier than that. Surely that is substantial agreement with the authority voted. There is a presumption that the guaranty was within the powers of the corporation and its officers.

Bank *v.* Atkinson, 8 Kans. App. 30, 33.
Town Company *v.* Swigart, 43 Kans. 292.
Express Company *v.* Railroad, 99 U.S. 191, 199.

It is immaterial what the respondent may have known about the business of the company with reference to these guaranties. The corporation received full value for its guaranties to the petitioner, according to the facts found (Record, p. 7). The petitioner therefore had a valid judgment against the corporation which was contractual in its nature. To a judgment on such a claim the respondent has no defence, whether he was cognizant of the transaction or not. The contractual relation between the respondent stockholder and the petitioner creditor of the

corporation is implied by law, and is not a question of fact in any sense (see Record, p. 8).

Railroad *v.* Gebhard, 109 U.S. 527, 537, 538.
Howarth *v.* Lombard, 175 Mass. 570, 574–576, and cases cited.

Upon the facts found, then, the general finding for the defendant was error. The special finding covers all the issues raised by the pleadings, and this Court should direct such judgment to be entered as the special finding requires.

Allen *v.* St. Louis Bank, 120 U.S. 20, 40.
Fort Scott *v.* Hickman, 112 U.S. 150, 165, and cases cited.
Evans *v.* Kister, 92 Fed. Rep. 828, 833; 35 C. C. A. 28, 33.

Inasmuch as it expressly appears upon the face of the record that the petitioner is entitled to judgment, this Court ought to issue the writ of *certiorari* prayed for and bring the record of this case before the Court that judgment may be ordered for the petitioner as law and justice require.

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